

U.S. Department of  
Homeland Security

United States  
Coast Guard



United States Coast Guard  
ALJ Docketing Center

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January 17, 2012

Mr. Harold A. Ellis  
Associate St. Charles County Counselor  
100 North Third Street  
St. Charles, Missouri 63301

RE: DHS FOIA APPEAL A-11-0033

Dear Mr. Ellis:

This letter is in response to your correspondence dated May 31, 2011, appealing the Federal Emergency Management Agency's (FEMA) May 10, 2011, response to your January 6, 2011 Freedom of Information Act (FOIA) request concerning information maintained by the National Flood Insurance Program (NFIP).

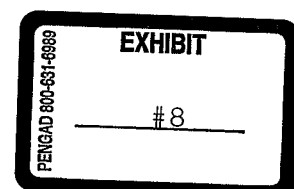
Pursuant to a memorandum of agreement, the United States Coast Guard Office of the Chief Administrative Law Judge is reviewing FOIA appeals for the Department of Homeland Security General Counsel's office. Therefore, the Office of the Chief Administrative Law Judge hereby renders the official appeal decision on behalf of the Department of Homeland Security.

FEMA's response to your January 6, 2011, FOIA appears to be twofold. First, they processed your FOIA request as a Privacy Act request and, second, they stated the information was already released under the "automatic" disclosure provisions of FOIA. After a thorough review of your appeal, the Agency's decision regarding your FOIA request is to remand to FEMA for further processing pursuant to guidance outlined within this letter.

In their May 10, 2011, letter to you, FEMA stated "[y]our request was made pursuant to the 'Routine Use K' of the Privacy Act of 1974, 5 U.S.C. § 552(a)1." As such, they disclosed the records to you as routine use pursuant to 5 U.S.C. § 552a(b)(3) of the Privacy Act.<sup>1</sup> You were informed that pursuant to the Privacy Act of 1974, you were not to share this information "with individual unless they have a direct need-to-know in the performance of their official duties." Since you intend to publicly disclose this information, obtaining the information under the Privacy Act limits your ability to disclose the information.

While you could have requested the information via the Privacy Act, you did not. In your original request, you stated you were requesting the information "under the Freedom of Information Act." Since you requested the information as a FOIA request, FEMA should not have processed your request as a Privacy Act request. Instead, FEMA needs to process your request exclusively as a FOIA request. If FEMA determines that certain information needs to be redacted or withheld, FEMA needs to provide the relevant FOIA exemption.

<sup>1</sup> Information regarding the "routine use" of information found within the National Flood Insurance Program files system of records can be found at 73 Fed. Reg 77747-01 (Dec. 19, 2008).



In addition to processing your request as a Privacy Act request, FEMA also stated “the agency released the information under subsection a(1) and a(2) [of 5 U.S.C. § 552] and were made available for public inspection and no demand was necessary.” FEMA is correct that FOIA contains “automatic” disclosure provisions.<sup>2</sup> If information has already been automatically disclosed, such information does not again need to be provided to the public via a FOIA disclosure request. See 5 U.S.C. § 552(a)(3)(A).

In this case, the information requested by the requester has not been disclosed to the public via an automatic disclosure provision of FOIA. In his FOIA request, the requester asked for “lists of severe repetitive-loss-properties or structures in St. Charles County . . .” This information has neither been listed in the Federal Register (automatic disclosure provision (a)(1)) nor has it been provided to the public via some electronic means (automatic disclosure provision (a)(2)).<sup>3</sup> After requesting the information, FEMA did not direct the requester to a forum in which the information has already been provided. Instead, FEMA sent the requester hardcopies of the information and informed the requester the information was “For Official Use Only.”

Accordingly, the instant matter is remanded to the Agency for further processing as a FOIA request. Since the information requested has yet to be released to the public via an automatic disclosure provision, FEMA needs to provide the relevant 5 U.S.C. § 552(b) exemption if they determine any of the requested information needed to be redacted or withheld.

Sincerely,



J.C. Johns, Esq.  
Attorney-Advisor

Copy: Department of Homeland Security FEMA  
Sent: Via Federal Express to the above address

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<sup>2</sup> The automatic disclosure provisions fall under 5 U.S.C. § 552(a)(1) and 552(a)(2). As noted by FEMA, these automatic disclosures provisions are discussed in the U.S. DOJ FOIA Update Vol. XIII, No. 3 1992.

<sup>3</sup> The Federal Register does contain information regarding the Privacy Act of 1974 and how it relates to the National Flood Insurance Program files system of records. See 73 Fed. Reg 77747-01 (Dec. 19, 2008). However, the information contained within this system of records (such as the specific information requested by the requester) has not been published in the Federal Register or electronically elsewhere.